In the Matter of **JOSEPH TRACANNA,** Complainant v. **ARCTIC SLOP INSPECTION SERVICE,** Respondent.	DATE: SEPTEMBER 18, 1998 Case No. 97-WPC-1

Appearances:

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For the Respondent

Before: Henry B. Lasky
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This matter arises under the employee protection provisions of the Toxic Substances Control Act, 15 U.S.C. § 2622, the Water Pollution Act, 33 U.S.C. § 1367, the Clean Air Act, 42 U.S.C. § 7622, and the Solid Waste Disposal Act, 42 U.S.C. § 6971 (hereinafter "Acts"). The applicable regulations enacted thereunder are contained at 29 C.F.R. Part 24. Such Acts prohibit an employer from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee engaged in activities that were statutorily protected. *See also* 29 C.F.R. § 24.2(a)-(c).

Complainant Joseph Tracanna commenced this proceeding by filing a complaint dated August 29, 1995, alleging that Respondent, Arctic Slope Inspection Service (hereinafter "ASIS"), had violated the statutes enumerated herein. Specifically, Complainant states that he because he engaged in protected conduct, he was subjected to harassment and intimidation during his employment with ASIS, including unnecessary medical examinations, blacklisting, pay cuts, demotions, and employment discrimination in hiring and recall.

Pursuant to a trial notice issued by the undersigned on February 8, 1998, a formal hearing was convened on June 9, 10, and 11, 1998 in Anchorage, Alaska. At the time of the hearing, Complainant's exhibits (CX) 1-94 and Respondent's exhibits (RX) 1-63 and 66-72 were admitted into the record. In addition, Complainant presented two demonstrative documents identified as Complainant's exhibits 95 and 96; such documents were not admitted as evidence but were retained as part of the record as demonstrative exhibits.

At the outset of the hearing, there was a preliminary discussion of the various motions that Respondent had filed prior to the date of the hearing: a Renewed Motion for Summary Decision, a Motion in Limine to Exclude Evidence of Medical Expenses, and a Motion in Limine to Exclude Evidence of Emotional Pain, Suffering, Mental Anguish, Embarrassment and Humiliation. With respect to Respondent's Motion for Summary Decision, the undersigned denied such motion without prejudice subject to renewal at the conclusion of Complainant's case, as there appeared to be triable issues of fact. During the course of the hearing, Respondent did not renew its Motion for Summary Decision. With respect to Respondent's Motions in Limine, the undersigned similarly denied such motions, but in the interest of due process and fairness afforded Respondent the opportunity to rebut such evidence by performing any necessary discovery after the hearing.

The parties were ordered to complete all necessary post-hearing discovery with respect to damages and also to file Proposed Findings of Fact and Conclusions of Law on or before August 14, 1998. I note that while both parties' post-hearing briefs were duly received within the time required, no supplemental evidence with respect to compensatory damages related to medical expenses or emotional distress was submitted. Based upon the stipulations of both parties, the evidence introduced at the trial, the testimony of the witnesses, and having considered the arguments made in their post-hearing submissions, I make the following findings of fact, conclusions of law, and recommended decision and order.

I. PROCEDURAL HISTORY

As previously stated, the underlying complaint in this matter was filed with the Wage and Hour Division of the U.S. Department of Labor on August 29, 1995 by Complainant. After an initial investigation, the District Director of the Wage and Hour Division issued a finding on January 27, 1997,[1] stating that Mr. Tracanna was a protected employee engaging in protected

[1] The Wage and Hour Division lost the complaint and did not begin investigating until ten months after the original filing.

activity within the scope of the Acts; that ASIS had discriminated against Mr. Tracanna in violation of the Acts; and that Complainant was entitled to various remedial measures. Respondent timely appealed, and the matter was subsequently forwarded to the Office of Administrative Law Judges for further disposition.

Pursuant to a notice issued by the undersigned on March 7, 1997, a formal hearing was scheduled to commence on July 16, 1997. At such time, Complainant was not being represented by Counsel. On April 24, 1997, Respondent filed a Motion for Summary Decision Based on Statute of Limitations. After receiving Complainant's response, the undersigned issued an Order Denying Summary Decision Without Prejudice, as a genuine issue of material fact existed with respect to the timeliness of Complainant's complaint. Respondent then filed a Motion to Compel Discovery Responses on May 21, 1997. Having issued to Complainant on May 22, 1997 an Order to Show Cause and an Order Compelling Discovery Responses, and having received no response from Complainant within the time required, the undersigned issued an Order that all Respondent's requests for admissions be deemed admitted. An Order for Sanctions was also issued by the undersigned on June 13, 1997 because of Complainant's failure to comply with Respondent's discovery requests. The undersigned subsequently received correspondence from Complainant, and such was considered to be a Motion for Reconsideration of the Order for Sanctions. The undersigned denied Complainant's Motion for Reconsideration on June 19, 1997.

On June 23, 1997, Respondent filed a Motion to Dismiss on the grounds that Complainant had failed and/or refused to comply with the discovery requests, had failed to make himself available for scheduled depositions, and failed to comply with previous orders issued by the undersigned. Accordingly, on June 25, 1997, the undersigned issued an Order to Show Cause why the matter should not be dismissed with prejudice. Complainant responded to the Order to Show Cause in a letter dated July 2, 1997. The undersigned ultimately issued a Recommended Order of Dismissal on July 3, 1997 based on Complainant's pattern of refusing to comply with lawful discover and refusing to comply with discovery orders issued by the undersigned.[2]

The matter was subsequently processed to the Administrative Review Board (hereinafter ARB) on July 25, 1997. After both parties submitted briefs, a Decision and Remand Order was issued by the ARB on November 6, 1997 (ARB Case No. 97-123). In such order, the ARB struck all orders issued by the undersigned wherein Complainant's admissions were deemed admitted; instructed that both parties were afforded the opportunity to respond to outstanding discovery requests and to engage in other appropriate discovery; and ordered that the complaint be remanded to the undersigned for further proceedings consistent with the Order. ARB Decision and Remand Order, pps. 6-7.

[2] In addition to Respondent's Motion to Dismiss for reasons related to discovery matters, on June 25, 1997 Respondent filed a Motion for Summary Decision based both on procedural and substantive issues. The undersigned did not consider the merits of this motion as the matter was disposed of pursuant to Respondent's Motion to Dismiss.

II. FINDINGS OF FACT

A. Background

The events of this case occurred between 1993 and 1996 in Alaska and involve a dispute between Joseph Tracanna, an electrical quality control inspector, and ASIS, a contractor providing quality control inspection services to the Alyeska Pipeline Service Company (hereinafter "Alyeska") on the Trans Alaska Pipeline System (hereinafter "TAPS"). CX 67. ASIS is a wholly owned subsidiary of Arctic Slope Consulting Group (hereinafter "ASCG"), which in turn, is a wholly owned subsidiary of Arctic Slope Regional Corporation. Transcript[3] (hereinafter "TR") 127.

Alyeska operates and maintains TAPS, an 800-mile pipeline that moves crude oil from the North Slope of Alaska to the Port of Valdez, Alaska. In Valdez, the crude oil is either stored in the oil tank farms and/or loaded onto oil tankers for shipment out of the area. CX 8. Alyeska's maintenance of TAPS necessarily mandates that the pipeline is in compliance with all state and federal regulations, including various environmental protection standards.

Alyeska's compliance with state and federal regulations has been the subject of various Congressional oversight committees. In 1992, a number of quality control inspectors "blew the whistle" on a quality control breakdown at Alyeska and raised numerous technical issues about the pipeline, asserting that they had been harassed, intimidated, and eventually terminated for opposing illegal and improper activities.[4] As a result of these public disclosures, Congress conducted an in-depth investigation into allegations of the quality control breakdown and the technical problems on the pipeline. In July of 1993, a Congressional hearing was convened regarding these allegations.[5] TR 50-58; CX 10. Subsequent to this Congressional hearing there was continued investigation, again culminating in a Congressional hearing in November of 1993. TR 51-52. The subject of both hearings included the employment status of the whistleblowers and their prospects of being rehired. TR 52; CX 10.

Generally, contract inspection companies had not been independent inspection companies,

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[3] All transcript citations throughout this Recommended Decision and Order refer to the Official Transcript produced by Bayley Reporting, Inc. It is noted for the record, however, that both parties have made citation references in their post-hearing submissions to an unofficial transcript produced by R & R Court Reporters, Inc.

[4] Mr. Tracanna was involved in an earlier whistleblower proceeding before the Department of Labor against Alyeska in 1992. This whistleblower complaint resulted in a settlement prior to the commencement of the 1993 Congressional hearings. TR 32-33; CX 10.

[5] Mr. Tracanna testified at the July 1993 Congressional hearing about the harassment, intimidation, and eventual termination from previous employment at the Valdez Marine Terminal which he suffered after he identified significant electrical system problems in 1990 and 1991. CX 10.

but rather worked directly for and under Alyeska supervisors. Because of Alyeska's compliance problems, Alyeska's new president, David Pritchard, committed that the new inspection contract would operate completely independent of Alyeska. CX 10. As such, Alyeska engaged in a contract with ASIS to provide full service inspection services of the pipeline, the pump stations, and at the Valdez Marine Terminal (hereinafter "VMT") during the period June 14, 1993 through June 14, 1996. CX 67. Under the terms of the contract, Alyeska defined the scope of the work to be performed by ASIS employees and the applicable budget; however Alyeska was not involved in any personnel decisions regarding such inspection services. TR 55-56; CX 67. Rather, ASIS would receive work orders from Alyeska which identified the type of experience and certifications required of the inspector needed. TR 520.

ASIS' responsibilities included a combination of seasonal and permanent projects. Much of the outdoor work on the pipeline was seasonal due to weather conditions. TR 408. However, some of the work, such as the inspections conducted at VMT, occurred year round. TR 409. Because of this irregular employment, ASIS maintained two levels of personnel: active status, employees currently assigned and working on specific projects; and inactive status, employees not currently working but available for recall on future assignments. TR 408; CX 52. If an inspector completed a seasonal project, and if no work was available immediately thereafter, the inspector would be laid off, but eligible for rehire once appropriate work became available. TR 408. After an inspector remained on inactive lay off status for a certain period of time without being rehired, ASIS would terminate that inspector's employment altogether; and the inspector would have to reapply to ASIS to be eligible for further work. TR 408-09.

B. Mr. Tracanna's Employment with ASIS

Mr. Tracanna was hired on December 6, 1993 by ASIS as a electrical field inspector and assigned to VMT to work on the National Electric Code (hereinafter "NEC") Compliance Project. TR 33, 52-54, 171; CX 18. His hourly rate of pay was $26.00 for regular time and $39.00 for overtime; in addition Mr. Tracanna received $70.00 per day to live in Valdez, Alaska. TR 33-36; CX 18. The NEC Project was promulgated in light of the Congressional oversight hearings and other regulatory reviews of the "whistleblower" allegations, so as to identify the electrical deficiencies at VMT and on the pipeline. This special inspection project was being conducted concurrent with daily oversight and inspection at VMT. TR 235-36. At the time in which Mr. Tracanna began working on the NEC project, it was governed by two NEC inspection plans, NEC Compliance Project QA-137 Inspection Plan and NEC Quality Plan QA-136. RX 44; RX 45; TR 532-35.

Mr. Tracanna's direct supervisor at VMT at the time of his employment with ASIS, beginning in December of 1993 and through his lay off in April of 1994, was Robert Richardson. TR 55. James Whitaker was also an ASIS supervisor at VMT, with the responsibility of overseeing the regular terminal inspection work. TR 194. Jack Blume was the ASIS supervisor in Fairbanks, Alaska over inspection work done along the 800-mile pipeline. TR 314-15, 356. Kenneth Catalino was the Director of Human Resources for ASCG and ASIS during the relevant

time period herein. TR 127. Lo Ann Larson worked under Mr. Catalino as the Human Resources Manager for ASCG and ASIS. TR 402. Marvin Swink was the Vice-President/General Manager of ASIS until May 6, 1994, when he and three other mangers were terminated. TR 376.379. William "Billy" Carver became the General Manager of ASIS after Mr. Swink was terminated. TR 531. Larry Coffman, Lee Adams, and Walter Glover were also ASIS electrical inspectors assigned to work at VMT or on the pipeline. TR 222, 289. In addition, James Kingrea was the Alyeska manager of the inspection process and William "Chuck" Biddy was his assistant. TR 304, 343.

While working on the NEC Project, Mr. Tracanna prepared a Non-Conforming Report (hereinafter "NCR") on February 25, 1994. TR 59; CX 14. The NCR identified a problem with the electrical grounding system at VMT; Mr. Tracanna categorized such problem as an "imminent threat" as it had the "potential for an unsafe condition which could present a significant hazard to plant personnel." CX 14. Various people responded to Mr. Tracanna's NCR in a negative fashion. Immediately after the NCR was issued, two Alyeska employees, Gabe Dunham and Robert Anderson, told Mr. Tracanna that the NCR should not have been written and should be withdrawn. TR 60-62. A meeting regarding the NCR was convened wherein another Alyeska employee, Mike Katyryniuk, told Mr. Tracanna that he was not a "team player" and that he too, believed that Mr. Tracanna should not have written the NCR. TR 63-64. Such meeting, however, was constructive in that Alyeska consultant Dr. Davies, a professor of electrical engineering, confirmed the substance of Mr. Tracanna's NCR, finding that the electrical system deficiency did create an "imminent threat." TR 65-66.

Mr. Richardson subsequently validated the NCR three days later.[6] TR 60. There is a discrepancy regarding the appropriate time period in which an NCR should be validated. Mr. Tracanna states that an "imminent threat" NCR must be validated immediately, and thus a three-day period does not suffice. TR 59-60. Mr. Biddy agreed with Mr. Tracanna, stating that a three day period to validate an imminent threat NCR was an absolutely unreasonable amount of time. TR 670. Mr. Carver, however, stated that a three-day period between issuing an NCR and its validation was not unusual. TR 546-47. Mr. Tracanna issued a second NCR on March 31, 1994, identifying an "imminent threat" to worker and property safety in the event of an earthquake. CX 17. It appears that Mr. Robertson validated this NCR on the same date of issuance, March 31, 1994. CX 17.

At some indeterminate date in March of 1994, Alyeska changed the standard for electrical

[6] Although the actual NCR was dated and signed by Mr. Richardson on February 28, 1994, Mr. Tracanna is skeptical of the actual date in which Mr. Richardson took action on the NCR, as the date in Box Number 14 appears to have been altered. TR 60; CX 14. While I am inclined to agree with Mr. Tracanna's observations, I make no finding as to the actual date in which Mr. Richardson actually validated and signed the NCR, as such information serves no useful purpose to the analysis herein.

inspections.[7] RX 46. Rather than using the National Electric Code, Alyeska adopted a lower standard for inspectors to follow, the Alaska Occupational Safety and Health Code requirements and the Alaska National Safety Code (hereinafter "AKOSH" or "ANSC" Project). TR 67, 69, 227-28, 536. Mr. Tracanna stated that the such standards "weren't stringent enough to incorporate the safety measures that are incorporated in the design construction and inspection of electrical systems." TR 67. Mr. Coffman had similar feelings, as he expressed concerns regarding the quality of electrical hardware installation and how it affected safety for personnel and the facility. CX 20. In fact, Mr. Coffman stated that the new standard eliminated 97% of the National Electric Code and failed to protect from environmental disasters, explosions, and incinerations. TR 227-28. Because of these issues, Mr. Coffman resigned from the AKOSH Project on March 31, 1994; ASIS accepted his resignation and reassigned him to his former duties as a regular inspector at the terminal. TR 229, 234-35.

On April 1, 1994, Mr. Tracanna also resigned from the AKOSH Project and requested that he be reassigned to other electrical duties. CX 22. Mr. Tracanna no longer wanted to work on the AKOSH Project, as he believed that the new procedures were in violation of state law and that such procedures made the conditions on the pipeline indeterminate and unsafe. TR 173. Rather than returning Mr. Tracanna to his regular duties as a terminal electrical inspector, ASIS placed Mr. Tracanna on lay off status effective April 2, 1994. CX 23.

Finally, on August 5, 1994, Mr. Adams also requested that he be removed from the AKOSH Project because of safety issues and reassigned to other electrical inspection duties. CX 24. Based on Mr. Coffman's testimony, it appears that Mr. Adams was in fact, reassigned to other inspection duties at VMT. TR 234.

It appears that Mr. Coffman, Mr. Adams, and Mr. Tracanna had similar feelings and reacted similarly to the adoption of the AKOSH standards. *See* CX 20. However, based on the evidence herein, it appears that Mr. Coffman and Mr. Adams were treated disparately from Mr. Tracanna. Not only were Mr. Coffman and Mr. Adams able to retain their former positions as electrical inspectors, but they were also sent an exit letter dated May 20, 1994, addressing their concerns regarding the AKOSH standards and possible resolutions to such concerns. CX 27. Mr. Tracanna was not re-employed as an electrical inspector, nor was he furnished an exit letter that addressed his concerns regarding the AKOSH Project.

ASIS contends that their failure to hire Mr. Tracanna for an electrical inspector position was due to their failing financial situation beginning in the middle of 1994. TR 516. The overhead costs were no longer being funded by Alyeska because the man hours had exceeded the contract requirement, and by late 1994 ASIS' profits were diminishing rapidly. TR 516-17. By the first quarter of 1995, ASIS was making an effort to contain costs by reducing the size of its

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[7] Although the new QA 136 procedures were approved on March 17 and 18, 1994 by Alyeska, Mr. Tracanna's March 31, 1994 NCR uses the NEC standard. There is no clear evidence in the record delineating the exact time in which the new procedures were adopted.

staff; reducing the number of inspectors by 20-30%. In addition, Mr. Carver stated that Alyeska had reduced the number of required inspections. TR 516-30.

There is substantial evidence in the record, however, supporting Complainant's contention that despite ASIS' failure to rehire him as an electrical inspector at VMT from the period of his lay off in April of 1994 until he formally resigned his position at ASIS in August of 1995, a tremendous amount of inspection work did exist at VMT during this relevant time period. As a result of the problems identified at VMT with respect to electrical systems and installations, there was a substantial electrical inspection work to be done. TR 219. Mr. Coffman and Mr. Glover credibly testified to this effect, wherein both witnesses stated that they were working a great deal of hours yet were unable to complete their work because there was so much of it. TR 219, 234, 240, 293.

Alyeska employees, Mr. Biddy and Mr. Kingrea, also testified that during 1994 and 1995, not only was there a continuing need for electrical inspection work on the pipeline and at VMT, but ASIS failed to fill the Alyeska requests for such inspectors. TR 313-14, 675-76. In fact, Mr. Biddy responded affirmatively when asked whether "the shortage of electrical inspections [was] a concern to Alyeska during the bulk of the ASIS contract following the 1993 Congressional hearings." TR 315. Mr. Biddy also stated that he and Mr. Kingrea discussed the fact that Mr. Tracanna was available for employment, yet was not being hired by ASIS to fill the Alyeska work orders. TR 314. Mr. Kingrea, similarly stated that Alyeska had submitted various work orders to ASIS for inspection services, yet they remained unfilled and outstanding. TR 365. Moreover, based on his knowledge of Mr. Tracanna, Mr. Kingrea believed that Mr. Tracanna would have qualified for a number of such positions. TR 365.

Despite overwhelming testimony that there were inspector jobs both appropriate and available for Mr. Tracanna during the relevant time period, ASIS failed to hire Mr. Tracanna for such positions. Mr. Tracanna testified that Mr. Swink and Mr. Richardson told him that they no longer had any electrical inspector work for him after he resigned from his position with the AKOSH Project. TR 70-71. Thereafter, however, ASIS and Mr. Tracanna engaged in a series of discussions regarding possible alternative positions. TR 80-100. In light of these offers, which Mr. Tracanna believed to be either illusory or inappropriate, and in light of the fact that he worked a negligible schedule in the months following his April 1994 lay off, Mr. Tracanna completely resigned from his employment with ASIS on August 1, 1995. CX 60; RX 3:22d.

C. ASIS' Employment Offers to Rehire Mr. Tracanna

ASIS contends that the first job offer made to Mr. Tracanna was that as a Quality Control Engineer (hereinafter "QCE") in Anchorage.[8] TR 80-81, 385-90, 586-90, 650-51. Mr. Tracanna

[8] Although the initial discussion of this job between Mr. Swink and Mr. Tracanna occurred prior to the date in which Mr. Tracanna was put on lay off status, such chronology is insignificant to the analysis of the matter herein.

had various discussions regarding the position, both prior to his resigning from the AKOSH Project and his lay off from ASIS on April 2, 1994. In March of 1994, Marvin Swink, ASIS Vice President and General Manager at the time, provided Mr. Tracanna with a job description detailing the requirements and a proposed salary of $75,000. The position involved directing electrical inspectors, reviewing quality inspection plans (QIP's), and performing field inspections. TR 388-89; RX 68. Mr. Tracanna ultimately declined to take the position on March 29, 1994, as he was "not comfortable" with the QCE job description. RX 70. Although, Mr. Swink and Mr. Tracanna had subsequent discussions regarding the QCE position, Mr. Tracanna continued to decline the position because he believed the offer was illusory and merely a pretext to remove him from working as an inspector. TR 587-89, 659-61; *see also* RX 71; RX 72; CX 25.

According to Mr. Tracanna's notes, it appears that Mr. Swink offered him a two week on/two week off job as an inspector in Fairbanks on April 18, 1994. RX 74. Mr. Tracanna declined this position, as his living arrangements would not accommodate such position and he felt it would be too confusing and inconvenient to work a two week on/two week off schedule. RX 74.

Mr. Tracanna was next offered a position as an Electrical Quality Specialist in Anchorage. TR 83-84, 87-89, 590-98; RX 3:28. Discussions between Mr. Carver and Mr. Tracanna regarding this position began sometime in the first week of June and lasted through August 17, 1994, when Mr. Tracanna finally declined the position. TR 590. This was a full-time position doing electrical inspection work inside Alyeska's office buildings in Anchorage. TR 598. Mr. Tracanna stated that he believed such position was an entry level position, and thus "it would be a demotion to take a position like this because the skills I have and the training, background and experience, none of these quality specialists would have." TR 89.

Concurrent with ASIS' offer of employment as an Electrical Quality Specialist was an offer to Mr. Tracanna as an electrical inspector at VMT with a two week on/two week off schedule opposite Larry Coffman. TR 84-85, 598-604. As admitted by Mr. Carver, although the workload could sustain a 60-70 hour workweek and that such position would last approximately three months, the position was merely a half-time position. TR 601-02. Curiously, although Mr. Tracanna was offered this position in the first week of June to begin the first week of July, Mr. Coffman did not start a rotational two week on/two week off schedule until August 10, 1994. RX 3:25; *see also* CX 83. Mr. Tracanna ultimately declined the position, as he did not want to commit himself to a part-time position when he anticipated obtaining a full-time position. TR 98.

On June 17, 1994, Mr. Carver offered Mr. Tracanna a position working as a Baseline Inspector on the pipeline. TR 605-07. However, Mr. Tracanna declined the position because he did not want to work on the line, as he was concerned for his personal safety. TR 646-47. Based on a number of unusual events which occurred after the Congressional hearing, i.e., Mr. Tracanna's car was broken into, another whistleblower's apartment had been broken into, an inspector sitting in his truck at a pump station was found dead, Mr. Tracanna felt that a job in which he worked by himself out on a remote area of the pipeline offered absolutely no protection.

TR 655-59.

The actual jobs that Mr. Tracanna obtained after his lay off in April of 1994 and until his formal resignation in August of 1995, were only sporadic, short-term assignments for ASIS. Thus, his employment status fluctuated between active employment, wherein he was working on an inspection assignment, and lay off status, wherein he was eligible for recall or rehire but not working. In June of 1994, Mr. Tracanna worked for five days as a crane inspector on the pipeline. TR 77-78. Following that job, Mr. Tracanna filled in for Mr. Coffman during his vacation as a baseline terminal inspector from July 3, 1994 through August 4, 1994. TR 78-79.

On September 6, 1994, Mr. Tracanna was placed on lay off status. CX 36. On September 21, 1994, Mr. Tracanna received notice from Ms. Larson that Mr. Carver's memo to President Robert Hilton was being placed in his personnel file. CX 38. This subject of this memo was "Joe Tracanna's Employment Timeline." CX 39. Such memo detailed in numbered and chronological paragraphs the various offers of employment made to Mr. Tracanna from the date of hire in December 1993 through his lay off in September of 1994. CX 39. Mr. Tracanna responded to the memo, stating that he disagreed with the memo because it was inaccurate, and that ASIS' obsessive documentation of the employment offers was misleading as they attempted to show that he was declining offers merely because he did not want to be employed. CX 38.

Between September 1994 and March 1995, ASIS did not offer any employment to Mr. Tracanna. TR 99. Finally, however, he conducted another series of crane inspections for approximately four weeks in April and May of 1995. *See* CX 72. Mr. Tracanna was subsequently placed on lay off status on June 4, 1995. CX 51. On August 1, 1995, Mr. Tracanna had a discussion with Ms. Larson, wherein he requested to be completely removed from the ASIS lay off roster. CX 60. In a letter dated August 2, 1995, confirming his conversation with Ms. Larson, Mr. Tracanna stated that ASIS and Alyeska

> created a situation where I am now driven to quit my employment as an electrical inspector with ASIS. I have endured discrimination, intimidation, harassment, pay cuts and blacklisting all because of exercising my rights with-in [sic] my employment which are protected activities under the law. This situation with regard to the many circumstances I now consider intolerable. CX 61.

Mr. Tracanna ultimately gained full-time employment as an electrical inspector with Chugach North Technical Services on August 12, 1996. TR 113. He continued to work for Chugach North until he assumed full-time employment with Alyeska in January of 1998. TR 115.

D. Attitude Toward Whistleblowers

There is substantial evidence in the record regarding the general hostility which Mr. Tracanna experienced throughout his employ with Respondent. As the whole community surrounding Valdez was aware of the Congressional hearings and the people working in the

pipeline industry were specifically aware of Mr. Tracanna's participation as a whistleblower against Alyeska in 1993, it appears that Mr. Tracanna, along with other whistleblowers, was subjected to instances of hostility by both Alyeska and ASIS employees. Various witnesses testified to this effect.

Mr. Glover stated that the original whistleblowers of the 1993 Congressional hearing were "commonly referred to as black-listed, trouble-making whistle-blowers . . . and they wouldn't be coming back." TR 296. Mr. Coffman testified that he personally experienced hostility, and stated that "[i]t was a bad work environment for everyone after [the 1993 Congressional hearing], especially if you were an inspector." TR 215; *see generally* TR 214-19. Mr. Biddy also stated that there was a lot of resentment and hostility against the rehiring of whistleblowers because of the negative exposure which their disclosures caused the pipeline and the terminal. TR 305, 317. Specifically, Mr. Kingrea stated that two ASIS supervisors, Mr. Blume and Mr. Carver, had remarked negatively about whistleblowers and that both supervisors had ill-feelings about their continued existence in the workplace. TR 356-57. In addition, both Mr. Whitaker and Mr. Coffman testified to specific instances in which Mr. Richardson, Mr. Tracanna's immediate supervisor on the NEC/AKOSH Project, made derogatory comments about Mr. Tracanna's employment with ASIS. TR 194-95, 230-31.

III. CONCLUSIONS OF LAW

A. Jurisdiction

The parties stipulated that Respondent is subject to the Acts, the Toxic Substances Control Act, 15 U.S.C. § 2622, the Water Pollution Act, 33 U.S.C. § 1367, the Clean Air Act, 42 U.S.C. § 7622, and the Solid Waste Disposal Act, 42 U.S.C. § 6971, at all times relevant to the matter herein, and that Complainant was a covered employee under the same while in the employ of ASIS. TR 46. As such, there are no jurisdictional issues to be resolved.

B. The Legal Framework of Complainant's Retaliation Action Under the Enumerated Acts

The legal framework to be applied in whistleblowing proceedings has become a jurisprudence recited ad infinitum in such cases. Carroll v. Bechtel Power Corp., 91-ERA-46 (Sec'y Feb. 15, 1995) has become the standard citation for Secretarial decisions, delineating the general burdens of proof and production. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). The Secretary and subsequently, the Administrative Review Board, has recognized however, that such jurisprudence has become less instructive, because regardless of whether complainant is successful in presenting a prima facie case and regardless of whether Respondent has rebutted that showing, the ultimate burden of proof is the responsibility of Complainant. Carroll v. Bechtel Power Corp., 91-ERA-46 (Sec'y Feb. 15, 1995), slip op. at 11 n.9, *aff'd sub nom.* Carroll v. U.S. Dept. of Labor, 78 F.3d 352, 356 (8th Cir. 1996).

Once the case is fully tried on the merits and the Respondent has produced evidence in an

attempt to show that Complainant was subjected to adverse employment action for a legitimate, nondiscriminatory reason, as in the matter herein, it no longer serves any analytical purpose to answer the question whether Complainant presented a *prima facie* case. Instead, the relevant inquiry is whether Complainant prevailed by a preponderance of the evidence on the ultimate question of liability. *See* St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993); Darty v. Zack Company of Chicago, 82-ERA-2 (Sec'y Apr. 25, 1983), slip op. at 7-8. If he does not prevail, it matters not at all whether he presented a *prima facie* case. If he does, whether he presented a *prima facie* case is also irrelevant. Adjiri v. Emory University, 97-ERA-36 @ 6 (ARB July 14, 1998); *see also* Yule v. Burns International Security Service, 93-ERA-12 (Sec'y May 24, 1995) (when the Respondent presented evidence to rebut a *prima facie* case of an ERA violation, the Secretary is not required to engage in a lengthy analysis of all the elements of a prima facie case).

In light of the aforesaid legal principle, I turn to the substantive issue presented in this matter, specifically upon consideration of the record as a whole, whether Mr. Tracanna proved by a preponderance of evidence that Respondent intentionally discriminated against him because of his protected activities. Jackson v. Ketchikan Pulp Co., 93-WPC-7 and 8 (Sec'y Mar. 4, 1996), slip op. at 4-5 n.1. To carry such burden, Complainant must prove that Respondent's stated reasons for its actions were pretextual, i.e., that Respondent's proffer was not the true reason for the adverse action, but rather Complainant was subjected to such adverse action because of his protected activity.[9] Leveille v. New York Air Nat'l Guard, 94-TSC-314 @ 4 (Sec'y Dec. 1, 1995).

Thus, the core issue in this matter is whether Mr. Tracanna can prove by a preponderance of evidence that he was subjected to adverse employment action subsequent to his resignation from the AKOSH Project on April 1, 1994, and that such adverse action was causally related to his protected activity. Mr. Tracanna submits that the adverse employment action manifested itself in a number of ways: (1) when ASIS put him on lay off status the day after his resignation from the AKOSH Project; (2) when ASIS refused to re-hire him to a full-time electrical inspector position throughout the remainder of 1994, 1995, and through the summer of 1996; and (3) when ASIS offered him various jobs that were allegedly inferior or unrelated positions to that of his

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[9] Although not necessary, a brief discussion of the prima facie elements is a useful starting point and helps to facilitate this analysis. The prima facie elements are: that Complainant engaged in protected conduct; that Respondent was aware of such conduct; that Respondent took some adverse action against Complainant; and that there is an inference the protected activity was the likely reason for the adverse action. Mackowiak v. University Nuclear Systems, 735 F.2d 1159 (9th Cir. 1984); Dartey v. Zack Company of Chicago, 82-ERA-2 (Sec'y Apr. 25, 1983).

There is no dispute that Mr. Tracanna engaged in protected activity prior to and during the course of his employment with ASIS; not only did he testify before Congress in 1993 regarding Alyeska's severe compliance problems, but Mr. Tracanna also wrote two NCR's while working for ASIS which identified significant deficiencies in the electrical system. In addition, there is no dispute that ASIS was aware of Mr. Tracanna's protected activity; the record is replete with evidence that ASIS, by and through its various supervisors, were aware of Mr. Tracanna's status as a previous whistleblower and as the author of two NCR's in 1994.

customary position as an electrical inspector. In addition, Mr. Tracanna submits that such actions were retaliatory in nature, as the effect was to remove him from any electrical inspector position where he could "blow more whistles."

1. Whether ASIS' April 2, 1994 lay off of Mr. Tracanna constitutes an adverse employment action motivated by his protected activity.

Inclusion in a lay off constitutes adverse action. Nichols v. Bechtel Construction, Inc., 87-ERA-44, @ 7-8 (Sec'y Oct. 26, 1992); *see also* Emory v. North Bros. Co., 86-ERA-37 (Sec'y May 14, 1987). A causal connection between the protected activity and the adverse employment action may be circumstantially established by showing that the employer was aware of the protected activity and that adverse action followed closely thereafter. *See* Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989). Thus, proximity in time can be considered solid evidence of causation. White v. The Osage Tribal Council, 95-SDW-1, slip op. at 4 (ARB Aug. 8, 1997). *See also* Carson v. Tyler Pipe Co., 93-WPC-11 (Sec'y Mar. 24, 1995) (ten months between protected activity and adverse action sufficient to raise inference of causation); Thomas v. Arizona Public Service Co., 89-ERA-19, (Sec'y Sept. 17, 1993) (one year sufficient to raise inference of causation).

There is no dispute that Mr. Tracanna was put on lay off status on April 2, 1994, the day after he resigned from his electrical inspector position on the AKOSH Project; nor is there a dispute that Mr. Tracanna issued two NCR's on February 24, 1994 and March 31, 1994. The close proximity in time between the issuance of such NCR's and ASIS's subsequent lay off of Mr. Tracanna circumstantially shows a causal relationship that Respondent acted in retaliation because of Mr. Tracanna's protected activity.

Respondent first asserts that it was because of Complainant's own actions that caused him to be placed on lay off status; specifically, it was Mr. Tracanna's own choice to resign from the AKOSH Project. As such, his lay off cannot be construed as an adverse employment action. Respondent further argues, if the undersigned considers such lay off to be an adverse action, that it had a legitimate nondiscriminatory reason for taking such action, that his lay off was not motivated by discrimination, but rather for reasons related to ASIS' financial situation.

With respect to ASIS's first contention, that it was because of Complainant's own resignation which fueled his placement to lay off status, I find that an appropriate analysis includes the law of constructive discharge. "Constructive" discharge assumes that a complainant was not formally discharged, but was forced to resign as opposed to quitting voluntarily. A finding of constructive discharge requires proving that the working conditions were rendered so difficult, unpleasant, unattractive or unsafe that a reasonable person would have felt compelled to resign. *See* Nathaniel v. Westinghouse Hanford Co, 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 20; Johnson v. Old Dominion Security, 86-CAA-3, 4, and 5 (Sec'y May 29, 1991), slip op. at 19-22 and n.11 (citing Clark v. March, 665 F.2d 1168, 1174 (D.C. Cir. 1981)). In addition, in order for Complainant to carry the burden of proving constructive discharge, the Complainant must show

the presence of "aggravating factors." Id.

Based on the evidence in the record, I find that Mr. Tracanna's working conditions on the AKOSH Project, prior to his resignation on April 1, 1994 were rendered so unsafe that a reasonable person would have felt compelled to resign. Mr. Coffman, Mr. Adams, and Mr. Tracanna all elected to resign from the AKOSH Project because of safety concerns associated with the decreased AKOSH standards from the NEC standards. There is no evidence to the contrary and the credible testimony of Mr. Coffman and Mr. Tracanna tends to prove that any reasonable person under the same conditions would have felt compelled to resign.

Moreover, the following aggravating factors were present prior to Mr. Tracanna's resignation on April 1, 1994: Mr. Tracanna was the victim of harassing and threatening comments subsequent to issuing his February 25, 1994 NCR; Mr. Coffman stated that there was a general and severe hostility against any employee issuing an NCR; and Mr. Tracanna legitimately believed that the adoption of the lower standards posed potential criminal penalties for him, endangered the health and safety of other employees, and potentially risked disaster to the environment.[10] As such, I find that Mr. Tracanna's resignation from the AKOSH Project upon his own volition constitutes a constructive discharge, and does not preclude him from claiming that the subsequent lay off on April 2, 1994 was an adverse employment action taken by ASIS.

In order to demonstrate a violation of the Act, however, Complainant must establish that his subsequent lay off was in retaliation for his protected activities, and not for the reason advanced by Respondent. Complainant may demonstrate this burden by showing that the discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 257 (1981). This standard is further explained in St. Mary's Honor Center v. Hicks, 509 U.S. 502, 519 (1993), "[i]t is not enough . . . to *dis*believe the employer; the fact finder must *believe* the plaintiff's explanation of intentional discrimination." (emphasis in original). Thus, Complainant must prove that Respondent intentionally discriminated against him when it failed to provide him with other inspection duties subsequent to his April 1, 1994 resignation, and that Respondent's proffered explanation regarding his April 2, 1994 lay off was a mere pretext.

I find that Complainant has sufficiently met his burden with respect to proving that Respondent intentionally discriminated against him when they failed to reassign him to electrical inspector work after he resigned from the AKOSH Project and that Respondent's proffered explanation, that it lacked inspection work due to ASIS' financial situation, is not worthy of

[10] Although there is no evidence that any ASIS employee was ever subjected to fines or criminal penalties, based on Mr. Coffman's corroborating testimony, I find it sufficient that Mr. Tracanna legitimately perceived the possibility of such consequences if he had remained on the AKOSH Project.

credence.[11] Specifically, after Mr. Coffman and Mr. Adams resigned from the AKOSH Project, ASIS returned both employees to full-time positions as regular electrical inspectors at VMT. The only distinguishing factor between Mr. Tracanna and the two other inspectors was that Mr. Tracanna had a reputation as a former whistleblower and that he had recently issued two NCR's. Respondent has not presented any evidence proving a legitimate reason for having retained Mr. Coffman and Mr. Adams, but not Mr. Tracanna. Curiously, Mr. Adams resigned after Mr. Tracanna and was able to retain a job as an electrical inspector, but Mr. Tracanna was not.

In addition to ASIS' proffered explanation of its lay off of Mr. Tracanna on April 2, 1994 for lack of work, there is also evidence in the record of specific animus held against Mr. Tracanna by an ASIS employee. Shortly after Mr. Tracanna was laid off from work on April 2, 1994, there was an episode involving Mr. Richardson, Mr. Tracanna's supervisor, wherein he made a statement to the effect that "he was the only [one] with big enough balls to . . . get rid of Joe." TR 195. Mr. Whitaker, another ASIS supervisor, testified that in addition to hearing Mr. Richardson make such statement at a local bar, he had heard Mr. Richardson make derogatory comments regarding Mr. Tracanna on a number of other occasions. TR 194. While there was ample testimony during the hearing with respect to whether the "Richardson" comment was actually made and with respect to an investigation conducted by ASIS about such comment, I find that there is sufficient evidence in the record tending to show that Mr. Richardson did in fact, make some untoward statement in regards to a deliberate and intentional act terminating Mr. Tracanna's employment with ASIS.

Thus, based on the evidence with regard to Mr. Richardson's attitude toward Mr. Tracanna and ASIS' inability to explain why Mr. Adams was re-employed as an electrical inspector but not Mr. Tracanna, I find that discrimination was the more likely motivating factor in ASIS placing Mr. Tracanna on lay off status on April 2, 1994, and their proffered explanation is not worthy of credence.

2. Whether ASIS' refusal to hire Mr. Tracanna to a full-time electrical inspector position throughout the remainder of 1994, 1995, and through the summer of 1996 constitutes adverse employment action motivated by his protected activity.

Complainant contends that ASIS' failure to rehire him as an electrical inspector throughout the period following his lay off and until he ultimately retained alternative employment at Chugach North constitutes a continuing adverse employment action motivated by his protected activity. I

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[11] The theory forwarded herein, that ASIS' action of placing Mr. Tracanna on lay off status on April 2, 1994 rather than allowing him to maintain active status is an adverse employment action motivated by protected conducted, is distinguishable from the theory discussed *infra*, that ASIS failed to rehire Mr. Tracanna subsequent to his lay off. The distinctive element is that when Mr. Tracanna was constructively discharged from the AKOSH Project, he was still on active status and requested to be reassigned to another electrical inspector position at VMT. At such time, ASIS would not be "rehiring" Mr. Tracanna, but merely reassigning him.

disagree. In cases of failure to hire or rehire, in order to show that adverse employment action occurred, a complainant must establish that he was qualified for the position, that he applied for the position, the employer was otherwise obligated to consider him, that he was rejected, and that after his rejection, the employer hired another individual not protected by the Acts or the position remained vacant. Holtzclaw v. Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet, 95-CAA-7 (ARB Feb. 13, 1997); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

While I find that there may be an appearance of discriminatory motive for ASIS' failure to rehire Mr. Tracanna in a full-time electrical inspector position, it is clear that he fails to meet the legal standard establishing that ASIS' failure to rehire him was an adverse employment action motivated by protected activity. While there is ample evidence generally demonstrating the availability of electrical inspector positions, Mr. Tracanna failed to set forth specific evidence that he actually applied for an electrical inspector position,[12] that ASIS did not otherwise consider him, that he was rejected for such position, and that after his rejection, ASIS hired another individual not protected by the Acts or the position remained vacant. As such, I find and conclude that under Complainant's failure to rehire theory, ASIS' actions throughout the relevant time period do not constitute a continuing adverse employment action

3. Whether ASIS' offers of various jobs that were allegedly inferior or unrelated positions to that of Mr. Tracanna's customary position as an electrical inspector constitutes adverse employment action motivated by his protected activity.

Whistleblower provisions prohibit discrimination with respect to an employee's compensation, terms, condition, or privileges of employment, including transfer to a less desirable position, even though no loss of salary may be involved. Martin v. The Department of the Army, 93 SDW-1 (Sec'y July 13, 1995). The Sixth Circuit Court of Appeal has found that the following factors indicated that an employee's transfer was a demotion: the new job was far less attractive and prestigious; the new tasks were below complainant's proven capabilities; complainant no longer had supervisory responsibilities; complainant's new work included certain clerical functions; complainant was moved from an office to a shared work table in an open room with no telephone; and complainant was "invisible" with respect to quality assurance, as he did not sign his name to reports. DeFord v. Secretary of Labor, 700 F.2d 281, 287 (6th Cir. 1983); *see also* Harrison v. Stone & Webster Engineering Group, 93-ERA-44 (Sec'y Aug. 22, 1995) (transferring complainant to outside crew as opposed to allowing complainant to do "inside work" adversely affected his terms, conditions or privileges of employment although no wage differential was involved); Jenkins v. U.S. Environmental Protection Agency, 92-CAA-6 (Sec'y May 18, 1994) (employee transferred from challenging, technical position that utilized her qualifications fully and required community interaction to isolated, administrative position); McMahon v.

[12] There is evidence regarding Mr. Tracanna's application for a certain rotating electrical inspector position in May of 1996. However, such application was received by ASCG Human Resources after the closing date for such position. TR 500-503.

California Water Quality Control Board, San Diego Region, 90-WPC-1 (Sec'y July 16, 1993) (where complainant was transferred from "surveillance and enforcement" units to the "permits and requirements" unit, the record supported a finding that the transfer constituted adverse action in response to protected activity, as it prevented complainant from performing supervisory duties and field inspection work, which he preferred).

Moreover, the fact that an employee refuses to accept a retaliatory transfer does not render the retaliatory act of transferring the employee moot. Instead, the employee's refusal to accept the transfer is relevant to the remedy to which the employee may be entitled. If the employee is found to have been constructively discharged, reinstatement would be appropriate and post-resignation back pay would be allowed. 42 U.S.C. § 5851(a)(1); *see* Delaney v. Mass. Correctional Ind., 90-TSC-2 (Sec'y Mar. 17, 1995), slip op. at 3 (under the Toxic Substance Control Act); Nathaniel v. Westinghouse Hanford Co., 91-SWD-2 (Sec'y Feb. 7, 1995), slip op. at 7 (under the Solid Waste Disposal Act); and Harrison v. Stone and Webster Engineering Group, 93-ERA-44 (Sec'y Aug. 22, 1995), slip op. at 3.

Complainant contends that ASIS intentionally kept him away from field inspection work by forcing him into alternative assignments effectively preventing him from access to the pipeline or the ability to engage in meaningful communications with government agencies. He further contends, that each of the alleged legitimate offers made during the relevant time period were either illusory offers, i.e., they were offers to Mr. Tracanna so as to create an appearance of nondiscriminatory treatment, or they were offers that were not substantially equivalent positions to his former employment as an electrical inspector. As such, Mr. Tracanna argues that he was not obligated to accept any such offers.

In addition to Mr. Tracanna's arguments, a significant factor to be considered in the appropriateness of ASIS' various employment offers to Mr. Tracanna is the availability of electrical inspection work during this time period. Interestingly, there is a great deal of evidence demonstrating to the undersigned that a substantial amount of electrical inspection work existed pursuant to Alyeska work orders. ASIS refutes this evidence by arguing that Complainant's failure to provide an actual work order issued by Alyeska and not filled by ASIS tends to show that no such work orders existed. In addition, ASIS directs the undersigned's attention to the fact that Mr. Kingrea and Mr. Biddy had no actual knowledge of the ASIS hiring process and thus, their opinion with respect to Mr. Tracanna's availability and his qualifications is merely speculative. I find both of these arguments wholly unpersuasive.

Most significantly, Mr. Kingrea and Mr. Biddy testified to the abundance of electrical inspection work at VMT and on the pipeline. Mr. Kingrea impressively testified that there was plenty of work to be done for electrical inspectors, and that although he continued to submit work orders for electrical inspectors, ASIS did not fill these work orders. Mr. Biddy stated that there was so much electrical inspector work that remained undone that Mr. Kingrea and other employees were getting concerned. In fact, both Mr. Kingrea and Mr. Biddy testified that they believed Mr. Tracanna was qualified for the majority of the work orders which remained

outstanding, and that they continued to recommend that ASIS hire Mr. Tracanna for such work.

There is a conflict of evidence in this regard, as Mr. Carver testified that there were no outstanding work orders from Alyeska. In fact, Mr. Carver stated that all work orders were actively pursued, as that was how ASIS made their money. Having considered the testimony and the demeanor of the aforementioned witnesses, along with the testimony of Mr. Coffman and Mr. Glover who stated that there was more than enough work for them as electrical inspectors, I find that the weight of the evidence suggests that there was ample work for electrical inspectors. The only evidence suggesting that electrical inspection work was not available was the testimony of Mr. Carver; and I find that the facts plainly do not support Mr. Carver's position. In addition, I find that Complainant's inability to produce an actual work order is immaterial, as the credible testimony of the witnesses, specifically of Mr. Kingrea, provided herein sufficiently demonstrates to the undersigned that such work was available and Mr. Tracanna was qualified for it.

Based on the aforesaid law regarding the factors to be considered in finding a "demotion," and in light of the availability of electrical inspector jobs, I find that all of the positions which ASIS offered to Mr. Tracanna subsequent to April 2, 1994 and through his eventual resignation on August 1, 1995 can and should be considered demotions. Mr. Tracanna deemed the non-electrical inspector positions as less desirable and as a pretext to remove him from the field where he so effectively documented quality and safety concerns. In addition, the electrical inspector positions that ASIS did offer to Mr. Tracanna were for indeterminate durations rather than any permanent full-time positions in Valdez or Anchorage, as Mr. Tracanna had requested. I agree with Mr. Tracanna's contentions.

The basic purpose of the employee protection provisions found in the various Acts is to safeguard an employee from retaliation by his employer when he has acted in a way that serves a greater good than that of the employer's financial gain. I am inclined to believe that Mr. Tracanna was exercising his rights under this principle, and that he should not have to endure any loss with respect to the terms, condition, or privileges of his employment because of it. The fact that ASIS repeatedly offered Mr. Tracanna positions that are in different areas than his area of expertise as an electrical inspector or merely short-term electrical inspector positions, along with the fact that such full-time positions were available, are indications that ASIS purposely kept him away from full-time positions where he could cause more trouble for ASIS' relationship with Alyeska.[13] I also find that ASIS' concerted effort to diligently offer Mr. Tracanna employment outside of the electrical inspector positions was an effort, not only to conceal their removing him from such positions, but also to document their offers of "generosity" so that Mr. Tracanna would not be able to claim retaliation at some later point.

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[13] There was testimony by Mr. Coffman stating that Mr. Carver "referred to whistle-blowers as one of the reasons that ASIS was in trouble with Alyeska and that now that they seemed to have [them] gone from the terminal . . . that they were hoping that they could get back in good graces with Alyeska." At the time Mr. Carver made this statement, Mr. Tracanna was not working at the terminal. TR 251.

Specifically, the QCE position and the electrical quality specialist were jobs outside of his expertise as an electrical inspector, and thus not equivalent transfers, regardless of the fact that there may not have been any reduction in salary. Mr. Tracanna perceived such positions to be less desirable and below his proven capabilities, and mere attempts to remove him from the position that he was qualified for and preferred. In addition, the two week on/two week off inspector position in Fairbanks and the two week on/two week off terminal electrical inspector position working opposite Larry Coffman were not suitable positions, as they were not full-time electrical inspector positions. Such a part-time position can be considered a demotion, as it forces Mr. Tracanna to perform his duties on a mere half-time basis and he must forego any chance at obtaining a full-time electrical inspector position. A part-time position is less attractive, less prestigious, and inevitably affects Mr. Tracanna's overall compensation. Finally, I am in agreement with Mr. Tracanna that the full-time Baseline Inspector position on the pipeline was not a desirable job, as such a position would have severely jeopardized his personal safety. Were Mr. Tracanna forced to take such a position, it would have necessarily affected the terms and conditions of his employment with ASIS.

With regards to ASIS' actions, there appears to be an obsessive documentation of the job offers made to Mr. Tracanna by ASIS, and a curious interest taken by various members of upper level management in regards to Mr. Tracanna's employment situation. *See* CX 39. Mr. Tracanna, on the other hand, presents himself as a credible witness on his own behalf; and almost every witness presented by both Respondent and Complainant testified to Mr. Tracanna's exceptional reputation as an electrical inspector, a hard worker, and as an honest person. TR 531 (Mr. Carver); TR 289 (Mr. Glover); TR 135-36 (Mr. Catalino); TR 253 (Mr. Coffman); TR 234-35 (Mr. Biddy); TR 372 (Mr. Kingrea). In light of these factors, I am sufficiently persuaded that Complainant has proven by a preponderance of evidence that each offer of employment which ASIS made to Mr. Tracanna was a demotion, as they were attempts to remove him from full-time electrical inspector positions, and that ASIS acted in such a way as to retaliate against Mr. Tracanna because of his prior protected activities.

C. The Effect of Mr. Tracanna's August 1, 1995 Resignation

Mr. Tracanna's August 1, 1995 resignation, which was subsequently confirmed by way of a letter dated August 2, 1995, also falls under the principle of constructive discharge. Maintaining Mr. Tracanna on indeterminate lay off placed him in a continuous employment status inferior to that of his full-time electrical inspector position. Because Mr. Tracanna was not assigned to full-time electrical inspector positions that he was qualified for and which were available, ASIS' continued attempts to offer him inferior jobs rendered his conditions at ASIS so difficult, unpleasant, and unattractive, a reasonable person would have felt compelled to resign and obtain more appropriate employment elsewhere. There should be no expectation that Mr. Tracanna wait an interminable period for ASIS to offer him a suitable position.

The evidence in the record establishes that Mr. Tracanna has met his burden in proving by a preponderance of evidence that ASIS discriminated against him throughout the period between

his initial lay off on April 2, 1994 and his ultimate resignation on August 1, 1995. ASIS' proffered legitimate reasons for its conduct of placing Mr. Tracanna on lay off status immediately subsequent to his resignation from the AKOSH Project and their continued attempts to offer him inferior jobs that would have affected the compensation, terms, and privileges of his employment with ASIS, are not worthy of credence and are a pretext for the bias they held against him for his prior whistleblowing activities and issuance of two NCR's. I find and conclude that such acts constitute a continuous adverse action within the meaning of the Acts.

IV. DAMAGES

The Acts provide that upon finding a violation, the Secretary shall order the respondent to take affirmative action to abate the violation and reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment. 24 C.F.R. § 24.7(c)(1). Compensatory damages are also available, and a complainant may recover all costs and expenses reasonably incurred in bringing the complaint. Here, Complainant has requested an award of back pay with interest, lost benefits, and attorneys' fees and costs.

A. Back pay

1. Calculation of Complainant's Back Pay Award.

The "goal of back pay is to make the victim of discrimination whole and restore him to the position that he would have occupied in the absence of the unlawful discrimination." Blackburn v. Martin, 982 F.2d 125, 129 (4th Cir. 1992). Thus, an award of back pay runs from the date of termination until the date that the complainant was able to find suitable alternative employment, but such amount must be offset by any amount earned in a replacement job. Johnson v. Old Dominion Security, 86-CAA-3, 4, and 5 (Sec'y May 29, 1991).

Because Complainant was constructively discharged on April 2, 1994; was subjected to adverse employment action until he was again constructively discharged on August 1, 1995; and finally retained a suitable alternative employment position at Chugach North on August 12, 1996, Complainant is entitled to back pay from April 2, 1994 through August 12, 1996, less any amount that he earned during the interim. Derr v. Gulf Oil Corp., 796 F.2d 340, 343 (10th Cir. 1986).

Complainant has provided the undersigned with two alternative methods in calculating his wage loss throughout such period. The first is based on a Formula Method of which incorporates various assumptions: that Mr. Tracanna would work a fifty (50) week year, with 25 pay periods; that Mr. Tracanna would work a sixty (60) hour work week, wherein forty (40) hours would be considered standard working time and twenty (20) hours would be considered overtime; and that Mr. Tracanna would have been paid $26.00/hour for forty hours of straight time and $39.00/hour for overtime before April 1, 1995; and that because of across-the-board salary decreases, Mr. Tracanna would have been paid $24.00/hour of straight time and $36.00/hour of overtime after

April 1, 1995. *See Claimant's Post-Hearing Brief, pps. 25-26.* The second method which Complainant proposes is a method based on the earnings of a Similarly Situated Employee - Walter Glover.

I find that the more appropriate method to use herein is the latter method. The Formula Method does not take into consideration the possibility of personal time, spontaneous work-load increases or decreases, or the general level of activity for inspectors during the relevant time period. If the Formula Method were the more accurate record, then Mr. Glover's pay records would evidence a schedule closer to that of the assumptions which Complainant proposes in his demonstrative exhibit 95 (50 work weeks per year/60 hour work week). However, because there is no correlation between the hours assumed in the Formula Method and the actual hours that Mr. Glover worked, I cannot award Complainant a back pay remedy that, on its face, fails to reflect what he would have made as an electrical inspector had ASIS not discriminated against him.

Complainant argues that Mr. Glover is a similarly situated employee, as a review of their resumes demonstrates that they have similar experiences, qualifications, and backgrounds. During the period between April 1994 and August 1996, Mr. Glover worked on the Valdez Marine Terminal, along the pipeline, and in the Anchorage office of ASIS, projects that were similar to those that Mr. Tracanna would have been assigned to, had ASIS acted properly and without discriminatory motive. I agree that the amount of hours which Mr. Glover worked and the kinds of jobs which Mr. Glover held during the relevant time period make Mr. Glover an employee similarly situated to that of Complainant.[14] *See* Sprague v. American Nuclear Resources, Inc., 92-ERA-37 (Sec'y Dec. 1, 1994) (Sec'y affirmed ALJ's finding that back pay shall be based on the number of hours worked by similarly situated employee). In addition, the application of this method must also take into consideration the across-the-board salary decreases that effected Mr. Glover in April of 1995, and would have similarly effected Mr. Tracanna's salary. CX 45.

From the period beginning April 2, 1994[15] through the pay period ending December 18, 1994, Mr. Glover worked a total of 1238 hours of straight time and 423 hours of overtime, *see CX 92*; from the pay period beginning December 19, 1994 through the pay period ending December 31, 1995, Mr. Glover worked a total of 1796.50 hours of straight time and 438 hours of overtime, *see CX 61 and 93*; and finally for the pay period beginning January 1, 1996 through

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[14] Mr. Glover earned slightly more per hour than Mr. Tracanna in standard and overtime pay, however, I find such difference insignificant in determining that Mr. Glover is similarly situated employee to Complainant. In light of the other similarities that the two employees share, this fact is negligible.

[15] Although the pay period actually begins on March 28, 1994, the hours herein are calculated so as to reflect the proportional number of hours that Mr. Glover worked during the period between April 2, 1994 through the end of that pay period on April 10, 1994, i.e., he worked 80 standard hours in a 14-day period (assuming a 6-day work week), he thus worked 6.67 standard hours a day; he also worked 119 overtime hours in a 14-day period (assuming a 6-day work week), he thus worked 9.92 overtime hours a day. Using these numbers, Mr. Glover worked approximately 60 standard hours (6.67 x 9 days) and approximately 89 overtime hours (9.92 x 9 days) between the period April 2, 1994 through April 10, 1994.

the pay period ending August 11, 1996, Mr. Glover worked 944 hours of straight time and 424 hours of overtime, *see CX 61*. Based on the aforesaid numbers and the theory of the "similarly situated employee," I find and conclude that Mr. Tracanna is entitled to an award of back pay as follows.

April 2, 1994 through December 18, 1994

Straight Time:	1238 standard hours x $26.00/hour	=	$32,188.00
Overtime:	423 overtime hours x $39.00/hour	=	$16,497.00

December 19, 1994 through April 9, 1995[16]

Straight time:	626.5 standard hours x $26.00/hour	=	$16,289.00
Overtime:	75 overtime hours x $39.00/hour	=	$ 2, 925.00

April 10, 1995 through December 31, 1995

Straight Time:	1170 standard hours x $24.00/hour	=	$28,080.00
Overtime:	363 overtime hours x $36.00/hour	=	$13,068.00

January 1, 1996 through August 11, 1996

Straight time:	944 standard hours x $24.00/hour	=	$22,656.00
Overtime:	424 overtime hours x $36.00/hour	=	$15,264.00
			$146,967.00

Thus, the total amount that Complainant would have earned based on the number of hours that a similarly situated employee actually worked during the relevant time period is $146,967.00.

2. Complainant's Interim Earnings.

As mentioned, however, Complainant's back pay award must be offset by any income which Complainant earned during the interim. I note for purposes of the record that the evidence presented with respect to Complainant's interim earnings during the period April 2, 1994 through August 12, 1996 is deficient in several respects. Other than one work sheet delineating hours that Complainant worked for ASIS throughout 1994, 1995, and part of 1996, there is no clear indication as to the actual salary which Mr. Tracanna earned during the relevant time period. There was testimony regarding Complainant's interim earnings during a short-call in Miami, Florida, yet no specific evidence was submitted with respect to actual earnings. In the absence of

[16] The effective date of the salary decrease was April 3, 1995. However, for purposes of administrative convenience the salary decrease shall only be reflected from the pay period beginning April 10, 1995.

contradictory evidence, I find that pursuant to his testimony during the hearing, Mr. Tracanna earned a total of $35,811.00 in his interim earnings, and such shall be deducted from his back pay amount. *See* TR 36.

3. Complainant's Duty to Mitigate Damages.

ASIS argues that even if liability were to exist, Complainant is not entitled to back pay because he failed to mitigate his damages. ASIS relies on the various positions which it offered to Complainant pursuant to his resignation from the AKOSH Project on April 1, 1994, and the fact that Complainant rejected each such offer. In wholesale fashion, ASIS argues that Complainant's mere rejection prevents him from recovering back pay since he made no effort to mitigate his damages, and thus "cannot recover for any item or damages which could have been avoided." *Respondent's Post-Hearing Brief, p. 26.*

However, the law is not as simple as ASIS claims it to be. Rather, the law states that once the complainant establishes the gross amount of back pay due, the burden shifts to the respondent to prove facts that the complainant failed to mitigate his damages. In order for the respondent to show that the complainant has failed to do so, the respondent must prove that it made an unconditional offer to the complainant of reinstatement to his former position, or of substantially equivalent employment. Ford Motor Co. v. EEOC, 458 U.S. 219 (1982).

Thus, ASIS must prove that their various offers of employment of the QCE position, the two week on/two week off Fairbanks position, the electrical quality specialist position, the two week on/two week off terminal electrical inspector position opposite Larry Coffman, and the baseline inspector position were either reinstatements to "his former position" or "of substantially equivalent employment." In addition, the law states that a complainant is not required to work outside of his field of training; he need not relocate in order to mitigate damages; he need not accept a demotion; nor must he make any extraordinary efforts to find interim employment. NLRB v. Madison Currier, Inc., 472 F.2d 1307, 1320-21 (D.C. Cir. 1972) (employee need not "seek employment which is not consonant with his particular skills, background, and experience" or "which involves conditions that are substantially more onerous than his previous position"); Wonder Markets, Inc., 236 N.L.R.B. 787, (1978) (offer of reinstatement ineffective when discharged employee offered a different job, through former position still existed); Good Foods Manufacturing & Processing Corp., 195 N.L.R.B. 418, 419 (1972) (offer of reinstatement ineffective because job offered had different conditions of employment and benefits).

a. QCE Position

In March and April of 1994, Mr. Tracanna was offered the QCE position in the projects department in Anchorage. It appears that Mr. Swink and Mr. Tracanna engaged in multiple discussions regarding this position, specifically they discussed the job requirements, a proposed salary of $75,000, and Mr. Tracanna was sent a copy of the job description. The position, however, had nothing to do with electrical inspection, was not connected with any projects at

VMT, and was not a field inspector position. Mr. Swink testified that the position involved the reviewing of engineering drawings for accuracy and completeness; Mr. Tracanna recalled that the position had something to do with fiber optics, and believed such position to be a demotion. Based on the fact that the QCE Position was entirely outside of Mr. Tracanna's field of expertise, I find that such position is not a reinstatement to his former position, nor can it be considered substantially equivalent employment.

b. Two Week On/Two Week Off Fairbanks Position

Although this position was an electrical inspector position, it was beyond the geographical bounds which Mr. Tracanna was required to go in order to obtain suitable employment. Mr. Tracanna wanted to remain in Valdez or Anchorage and the Fairbanks position would have required him to relocate. As such, Mr. Tracanna was under no obligation to take this job so as to mitigate his damages.

c. Electrical Quality Specialist Position

This was a full-time position doing electrical inspection work inside Alyeska's office buildings in Anchorage. Mr. Tracanna believed such position to be a demotion, as his skills and expertise were superior to those of an employee who would have regularly taken the position. This position was outside of Mr. Tracanna's expertise as an electrical inspector, and thus I find that it is not a substantially equivalent offer of employment.

d. Two Week On/Two Week Off Terminal Inspector Position

With respect to this terminal inspector position, I find that Mr. Tracanna was under an obligation to accept such position, as it does meet with the standards of a substantially equivalent offer of employment. It was within his area of expertise, and although only a half-time position, it supports an income that is reasonably commensurate with that of a full-time position. The acceptance of such employment would have reasonably minimized the damages which ASIS incurred by not offering him a full-time position.

As there was testimony that the workload would have sustained a 60-70 hour workweek, I find it reasonable to assign an average of 65 hours of work every week, delineating 40 hours of standard time and 25 hours of overtime each week. As there was testimony that this position would have lasted three months, the actual time worked would be 6 weeks. Consequently, Mr. Tracanna would have worked a total of 240 standard hours (40 hours x 6 weeks) and 150 overtime hours (25 hours x 6). This position was offered to Mr. Tracanna prior to the across-the-board salary decreases, thus he would have been paid his normal rate of pay, $26.00/hour standard time and $39.00/hour overtime. As Mr. Tracanna was under an obligation to accept this position so as to minimize his damages, his back pay award is reduced by $12,090.00 (240 standard hours x $26 plus 150 overtime hours x $39).

e. Baseline Inspector Position

I find that Mr. Tracanna was under no obligation to take this baseline inspector position. The unusual circumstances surrounding the personal safety of the inspectors working out in remote areas of the pipeline are enough to demonstrate to the undersigned that Mr. Tracanna had good reason to reject such offer of employment. Mr. Tracanna need not make any extraordinary effort or compromise, as in the case of his personal safety, so as to mitigate his damages. Thus, Mr. Tracanna's refusal to accept such position did not amount to a failure to mitigate his damages.

Accordingly, I find that Complainant is entitled to an award of pack pay from April 2, 1994, the date of his constructive termination, through August 12, 1996, the date in which he obtained suitable alternative employment, in the amount of $146,967.00. However, such amount is offset by his interim earnings in the amount of $35,811.00 and his failure to mitigate damages in the amount of $12,090.00. Complainant's total back pay award amounts to $99,066.00.

B. Compensatory Damages

1. Damages related to medical costs.

The purpose of compensatory damages is to make the complainant "whole." Blackburn v. Martin, 982 F.2d 125 (4th Cir. 1992). Fringe benefits are an important part of an employee's overall compensation package, and therefore an employee cannot be made whole without receiving compensation for the loss of these benefits. "Accordingly, a damage award . . . should include those fringe benefits which the employee would have actually received had his employment not been wrongfully terminated. Galindo v. Stoody Co., 793 F.2d 1502, 1517 (9th Cir. 1986); *see also* Crow v. Noble Roman's, Inc., 95-CAA-8 (Sec'y Feb. 26, 1996) (Respondent ordered to pay as compensatory damages any reasonable medical costs that would have been covered under the Respondent's health insurance coverage).

Throughout his employ with ASIS, Mr. Tracanna was provided with employment benefits in form of medical coverage and health insurance. In light of the aforesaid legal principle, ASIS shall pay Mr. Tracanna any out of pocket medical expenses he incurred that would have been paid for by the health insurance available to him as an ASIS employee. *See* Doyle v. Hydro Nuclear Services, 89-ERA-22 @ 6 (ARB Sept. 6, 1996). As Mr. Tracanna suffered a heart attack on August 12, 1996, he is entitled to reimbursement for the costs associated with such treatment. Thus, Mr. Tracanna is entitled to recover $38,662.49 in medical expenses, an amount that would have been covered had he not been subjected to discrimination.

2. Damages related to emotional distress.

I note for purposes of the record that at the conclusion of the formal hearing, Counsel for both parties stated that there would be additional correspondence and/or post-hearing discovery with respect to the emotional distress claim. Neither party has subsequently made submission

with respect to this issue, nor did either party mention or argue such issue in their post-hearing briefs. As such, I find that the issue of Complainant's mental distress claim is deemed abandoned.

C. Attorneys' Fees and Costs

Pursuant to the statutes enumerated herein and the applicable regulations thereunder, Complainant is entitled to payment of costs and expenses, including attorneys' fees, reasonably incurred in bringing this complaint.

ORDER

1. ASIS shall pay Complainant back pay in the amount of $99,066.00.

2. Consistent with this Recommended Decision and Order, ASIS shall pay Complainant back pay plus interest at the rate specified in 26 U.S.C. § 6621 (1988).

3. ASIS shall pay Complainant compensatory damages for out-of-pocket medical costs in the amount of $38,662.49. ASIS is entitled to receive credit for all medical expenses reimbursed by its insurance.

4. (a) Counsel for Complainant shall file a Petition for Fees and Costs within 30 days after the filing of the Recommended Decision and Order for all legal services rendered with service on Counsel for Respondent. Such submission shall be on a line item basis and shall separately itemize the time billed for each service rendered and costs incurred. Each such item shall be separately numbered.

(b) Respondent may file objections, if any, to said application for fees and costs within 15 days of receipt, but all objections to said Counsel's petition shall be on a line item basis using Complainant's numbering system, and any item not objected to in such manner and within such time required shall be deemed acquiesced in by Respondent.

(c) Within 10 days after receipt of any such objections from Respondent, Counsel for Complainant may file a response thereto. Such submission shall be in the form of a line item response. Any objections not responded to in such manner and within such time will be deemed acquiesced in by Counsel for Complainant.

HENRY B. LASKY
Administrative Law Judge

Dated:
San Francisco, California

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Such petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).